Supreme Court, U.S.
FILED
OCT 14 1994
OFFICE OF THE CLERK

No. 94-212

In the Supreme Court of the United States

OCTOBER TERM, 1994

PAUL HOLMBERG AND MARIANA HOLMBERG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH DOVER
SUSAN M. SLEATER
TIMOTHY LORD
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the "forthwith" service requirement contained in Section 742 of the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, is a jurisdictional prerequisite to the waiver of sovereign immunity.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Amella v. *United States*, 732 F.2d 711 (9th Cir. 1984)	4, 5
Battaglia v. *United States*, 303 F.2d 683 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962)	4, 6
Budinich v. *Becton Dickinson & Co.*, 486 U.S. 196 (1988)	6
Caminetti v. *United States*, 242 U.S. 470 (1917)	5
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	6
City of New York v. *McAllister Bros.*, 278 F.2d 708 (2d Cir. 1960)	5
Dickerman v. *Northern Trust Co.*, 176 U.S. 181 (1900)	5
Firestone Tire & Rubber Co. v. *Risjord*, 449 U.S. 368 (1981)	6
Jones & Laughlin Steel, Inc. v. *Mon River Towing, Inc.*, 772 F.2d 62 (3d Cir. 1985)	4, 5
Kenyon v. *United States*, 676 F.2d 1229 (9th Cir. 1981)	4
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	6
Libby v. *United States*, 840 F.2d 818 (11th Cir. 1988)	4, 5
Munro v. *United States*, 303 U.S. 36 (1938)	6
Smith v. *United States*, 113 S. Ct. 2050 (1993)	5
United States v. *Mitchell*, 445 U.S. 535 (1980)	3
United States v. *Security Indus. Bank*, 459 U.S. 70 (1982)	6

Case—Continued:	Page
United States v. *Sherwood*, 312 U.S. 584 (1941)	3
Statutes and rules:	
Act of Mar. 24, 1943, ch. 26, § 1, 57 Stat. 45, 50 U.S.C. App. 1291	2
Federal Tort Claims Act, 28 U.S.C. 1346	4
Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*	2
46 U.S.C. App. 742	2, 3, 4
46 U.S.C. App. 743	4
28 U.S.C. 1292(b)	3
28 U.S.C. 2072	3, 4
Fed. R. Civ. P.:	
Rule 4	6
Rule 4(j) (1992)	2, 3, 4, 5
Rule 4(m)	2
Miscellaneous:	
Black's Law Dictionary (5th ed. 1979)	5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-212

PAUL HOLMBERG AND MARIANA HOLMBERG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is reported at 19 F.3d 1062. The memorandum opinion of the district court (Pet. App. A7-A9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1994. A petition for rehearing was denied on June 7, 1994. Pet. App. A10-A11. The petition for a writ of certiorari was filed on August 1, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners filed a seaman's personal injury action against the United States on March 20, 1992, under the Act of Mar. 24, 1943, ch. 26, § 1, 57 Stat. 45, 50 U.S.C. App. 1291, which is enforceable pursuant to the provisions of the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.* This initial action was dismissed without prejudice for failure to effect service on the Attorney General. Pet. App. A2. On November 13, 1992, petitioners refiled the action, serving the United States Attorney within 103 days and the Attorney General within 106 days after the refiling. *Ibid.*

2. The United States moved to dismiss the action for lack of subject matter jurisdiction for failure to effect service of process "forthwith," as required by Section 742 of the SAA. Section 742 provides, in part: "The libelant shall *forthwith* serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States." 46 U.S.C. App. 742 (emphasis added). The district court denied the motion, ruling that the "forthwith service" provision of Section 742 is a procedural provision incon[illegible]tent with and superseded by the 120-day period for service under Rule 4(j), now Rule 4(m), of the Federal Rules of Civil Procedure. Rule 4(m) provides, in part:

> If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows

> good cause for the failure, the court shall extend the time for service for an appropriate period.

The district court certified the question for interlocutory review pursuant to 28 U.S.C. 1292(b). Pet. App. A9.

3. The Fifth Circuit reversed, holding that Section 742 of the SAA contains the jurisdictional prerequisites to the United States' waiver of sovereign immunity, and that the "forthwith service" provision therefore could not be modified by Rule 4(j). Pet. App. A3-A5. The Fifth Circuit found that service of process effected 103 and 106 days after filing was not "forthwith," and rejected petitioners' argument that the determination that the district court lacked subject matter jurisdiction should only be applied prospectively. *Id.* at A5-A6.

ARGUMENT

1. This Court has long held that the terms of consent contained in a waiver of sovereign immunity define a court's jurisdiction, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and that the Federal Rules of Civil Procedure cannot relax the jurisdictional limitations included in such a waiver. *United States* v. *Sherwood*, 312 U.S. 584, 589-590 (1941). See also 28 U.S.C. 2072. The Fifth Circuit followed these principles in this case by holding that "forthwith service" is a requirement imposed by the waiver of sovereign immunity contained in the SAA and, thus, a jurisdictional prerequisite to suit that Rule 4(j) cannot alter. Pet. App. A3-A5.

The Fifth Circuit's decision was required by the language and statutory structure of the SAA. The waiver of sovereign immunity for suits against the United States is contained in Section 742. A condition for maintaining an action under that Section is "forthwith" service. Because jurisdiction for suit

against the United States lies only after fulfillment of all conditions for the waiver of sovereign immunity, the forthwith service requirement is a jurisdictional prerequisite that the Federal Rules of Civil Procedure may "not abridge, enlarge or modify." Pet. App. A4, quoting 28 U.S.C. 2072. See also *Libby* v. *United States*, 840 F.2d 818, 821 (11th Cir. 1988).[1]

In ruling that forthwith service is a jurisdictional prerequisite to suit under the SAA, the Fifth Circuit is in accord with the Second, Ninth and Eleventh Circuits, the other circuits that hear the vast majority of admiralty cases and the only other circuits to rule on the question. See, *e.g.*, *Libby* v. *United States*, 840 F.2d 818 (11th Cir. 1988); *Amella* v. *United States*, 732 F.2d 711 (9th Cir. 1984); *Kenyon v. United States*, 676 F.2d 1229 (9th Cir. 1981); *Battaglia* v. *United States*, 303 F.2d 683 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962). There is no conflict with the Third Circuit's decision in *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F.2d 62 (1985). In *Jones & Laughlin Steel*, the Third Circuit held that it lacked jurisdiction over the subject matter under the SAA and that jurisdiction existed only under the Federal Tort Claims Act, 28 U.S.C. 1346. 772 F.2d at 64-65. The court's statement that the service-of-process

---

[1] Additionally, Section 743 contains the procedural requirements for an action under the SAA. 46 U.S.C. App. 743. The Fifth Circuit, relying on *Libby*, 840 F.2d at 820, found that because Section 742 waives sovereign immunity, while Section 743 specifies the procedures governing admiralty suits, the requirements in Section 742 are more than procedural. Pet. App. A3-A4. The court thus held that the forthwith service requirement, as a necessary term of the Government's consent to be sued, is a substantive provision that Rule 4(j) cannot alter. *Id.* at A4-A5. Other circuits that have decided the issue have agreed with this analysis. See, *e.g.*, *Libby*, 840 F.3d at 820.

requirement under the SAA was procedural was therefore dictum.

2. Petitioners argue briefly that (1) even if the forthwith service provision is a jurisdictional prerequisite, the term "forthwith" is vague and should be defined as 120 days, the service requirement in Rule 4(j); and (2) the Fifth Circuit's decision should not apply retroactively to this case. Pet. 10-11.

This Court has held that an undefined term found in a statute should be construed in accordance with its ordinary, natural, and plain meaning. *Smith* v. *United States*, 113 S. Ct. 2050, 2054 (1993); *Caminetti* v. *United States*, 242 U.S. 470 (1917). "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella*, 732 F.2d at 713, quoting *Black's Law Dictionary* 588 (5th ed. 1979); accord *Libby*, 840 F.2d at 821; *City of New York* v. *McAllister Bros.*, 278 F.2d 708, 710 (2d Cir. 1960). Indeed, this Court has determined that "forthwith" "[i]n matters of practice and pleading * * * is usually construed and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900).[2] In contrast, Federal Rule of Civil Procedure 4(j) "sets 120 days as a presumption of unreasonable and dilatory delay in service of the complaint in any civil suit." *Amella*, 732 F.2d at 713. The Rule 4 benchmark for unreasonable delay is not an appropriate measure of what constitutes "forthwith service." Pet. App. A5.

---

[2] Courts agree that service beyond two months after filing the complaint is not "forthwith." *Libby*, 840 F.2d at 821 (collecting cases); *City of New York*, 278 F.2d at 710 (collecting cases). Even in *Jones & Laughlin Steel* the service was two months and one day after the filing of the complaint. See 772 F.2d at 63.

Nor is there a retroactivity problem in this case. "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *United States* v. *Security Indus. Bank*, 459 U.S. 70, 79 (1982). This case involves the interpretation of words in a statute that were unamended throughout the history of this case. *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1499-1502 (1994). The Fifth Circuit's decision here was also "clearly foreshadowed," *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971), because the same decision had been reached by three other circuits. In any event, this Court has expressly held that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981); *Budinich* v. *Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988).[3]

---

[3] Petitioners assert that they were misled by a form letter sent by the United States Attorney's office informing petitioners that the service of their initial complaint was defective, and generally referring petitioners to the service requirements of Rule 4. Pet. 8-9; see Pet. App. A12-A13. There is no evidence in the record that petitioners relied on the United States Attorney's letter in failing to effect forthwith service. Furthermore, in *Munro* v. *United States*, 303 U.S. 36, 41 (1938), this Court explicitly held that a United States Attorney is without "power to waive conditions or limitations imposed by statute in respect of suits against the United States," even where the United States Attorney provides misinformation that directly leads to a plaintiff's failure to satisfy a jurisdictional prerequisite. See *Battaglia*, 303 F.2d at 686.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH DOVER
SUSAN M. SLEATER
TIMOTHY LORD
Attorneys

OCTOBER 1994